

Complaint

IN THE MATTER OF

ANDREW N. FINKELCONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SECS. 5(A) AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket No. C-4338; File No. 102 3206
Filed, October 13, 2011 — Decision, October 13, 2011

Respondent Andrew Finkel developed and sold a mobile software application (“app”) called Acne Pwner in Google’s Android Marketplace. The Acne Pwner app directed consumers to hold a light-emitting display screen next to the area of skin to be treated for a few minutes each day. The complaint alleges that Respondent violated the FTC Act by claiming, without substantiation, that the Acne Pwner app effectively treated acne. The order prohibits Respondent from making any representations that Acne Pwner or any other device provides an effective treatment for acne, unless Respondent has competent and reliable scientific evidence to substantiate the claim. The order further requires Respondent to have competent and reliable scientific evidence before making any safety, performance, benefits, or efficacy claim about any device. Further, the order requires respondent to pay \$1,700 in consumer redress.

Participants

For the *Commission*: Stacey Ferguson and James A. Prunty.

For the *Respondent*: Robert J. Lunn, Trevett Cristo Salzer & Andolina, P.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that Andrew N. Finkel (“respondent”) has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Andrew N. Finkel (“Finkel”) is the developer, marketer, or seller of a mobile software application called “Acne Pwner.” At all times relevant to this complaint, Finkel, individually or in concert with others, formulated, directed, controlled, or participated in the acts or practices alleged in this

Complaint

complaint. His principal office or place of business is located in Rochester, New York.

2. Finkel has developed, labeled, advertised, promoted, offered for sale, sold, and distributed Acne Pwner to consumers, including teens, through the Android Marketplace, an electronic retail platform operated by Google, Inc., from at least February 1, 2010 and continuing thereafter. From February 1, 2010 through October 8, 2010, there were approximately 3,300 downloads of Acne Pwner.

3. Acne Pwner is a “device” within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

4. The acts and practices of respondent, as alleged herein, have been in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act.

5. Respondent has disseminated or caused to be disseminated advertisements for Acne Pwner through the Android Marketplace, including, but not limited to, the advertisement in the attached Exhibit A. This advertisement contains the following statements and depictions:

Pre-Download Advertisement: (Exhibit A - website print screen capture)

Kill ACNE with this simple, yet powerful tool!

“Light exposure has long been used as a short term treatment for acne. Recently, visible light has been successfully employed to treat mild to moderate acne.”

Blue frequency (Bacteria)
Red frequency (Healing)
Amber frequency (Repair) !NEW!

Keys: ZIT SKIN HEALTH SEX EASY FUN

{REVIEWS}

Complaint

* * *

6. Through the means described in Paragraph 5, respondent has represented, expressly or by implication, that Acne Pwner is an effective treatment for acne.

7. Through the means described in Paragraph 5, respondent has represented, expressly or by implication, that he possessed and relied upon a reasonable basis that substantiated the representation set forth in Paragraph 6, at the time the representation was made.

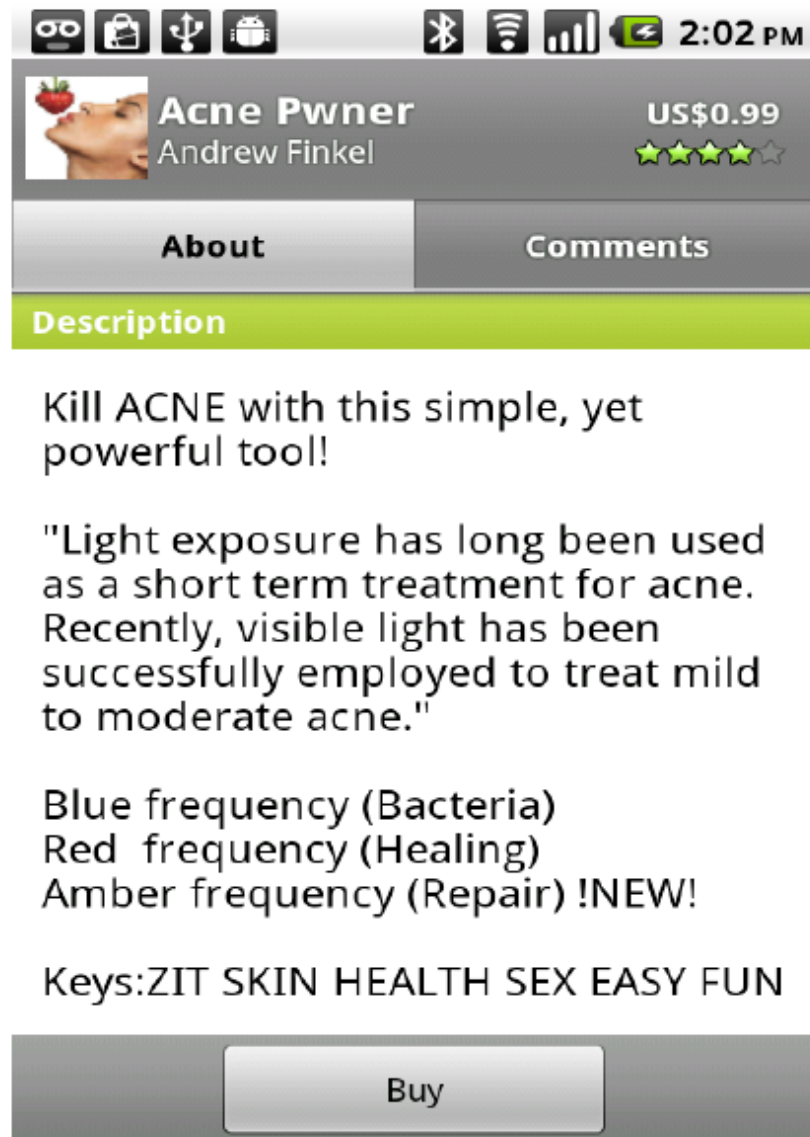
8. In truth and in fact, respondent did not possess and rely upon a reasonable basis that substantiated the representation set forth in Paragraph 6, at the time the representation was made. Therefore, the representation set forth in Paragraph 7 was, and is, false or misleading.

9. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices, and the making of false advertisements, in or affecting commerce, in violation of Sections 5(a) and 12 of the Federal Trade Commission Act, 15 U.S.C. §§ 45(a) and 52.

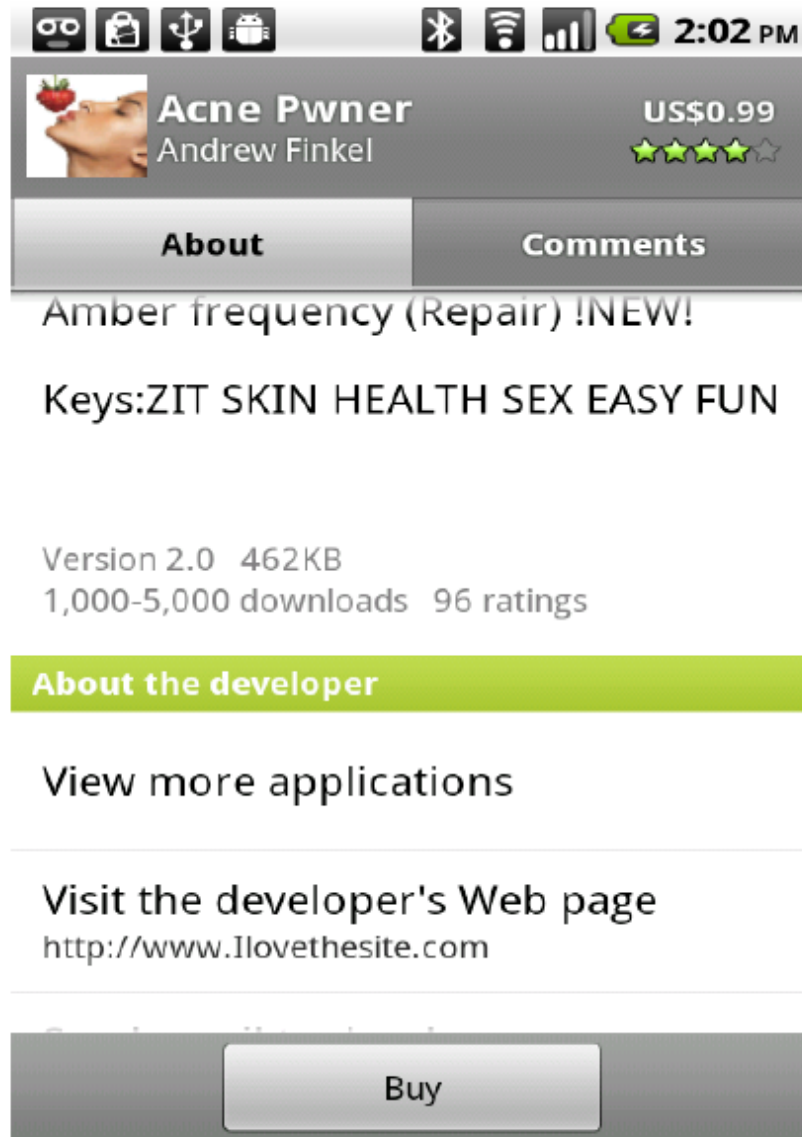
THEREFORE, the Federal Trade Commission, this thirteenth day of October, 2011, has issued this complaint against respondent.

By the Commission.

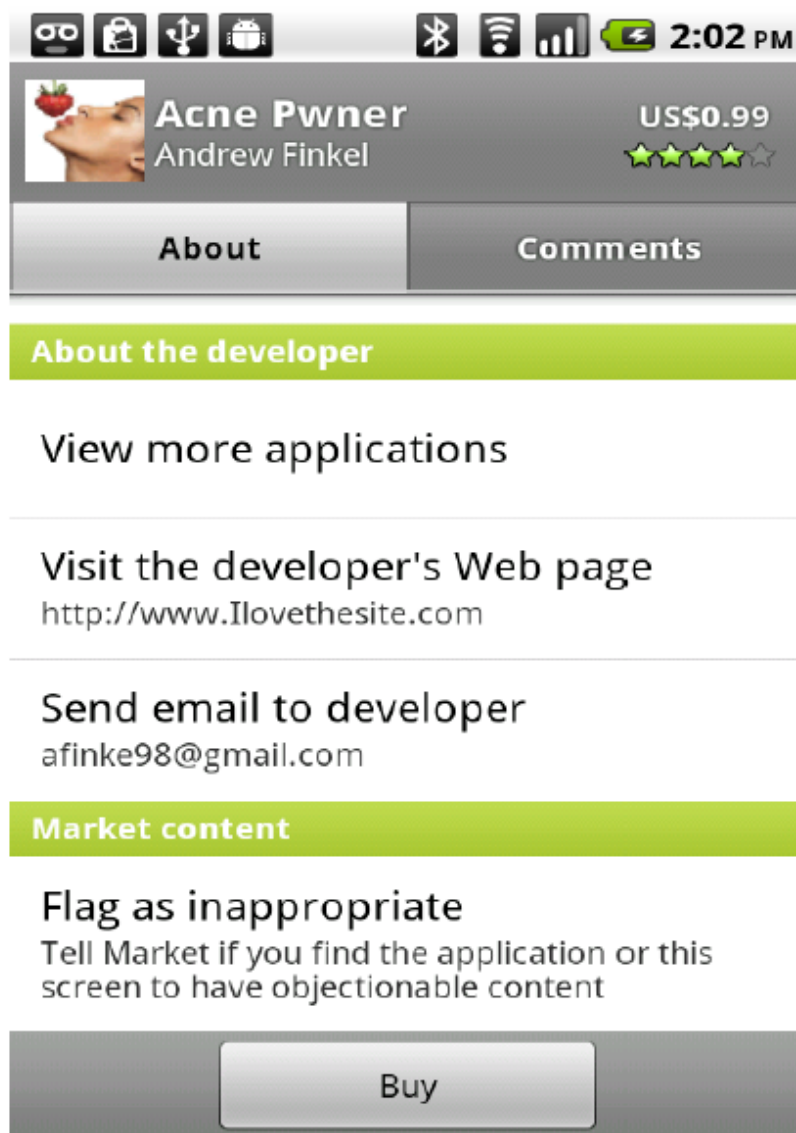
Complaint

EXHIBIT A

Complaint

EXHIBIT A

Complaint

EXHIBIT A

Complaint

EXHIBIT A

Complaint

EXHIBIT A

2:02 PM

Acne Pwner US\$0.99
Andrew Finkel ★★★★★

About **Comments**

grant 11/27/2010 ★★★★★
Haha Crap

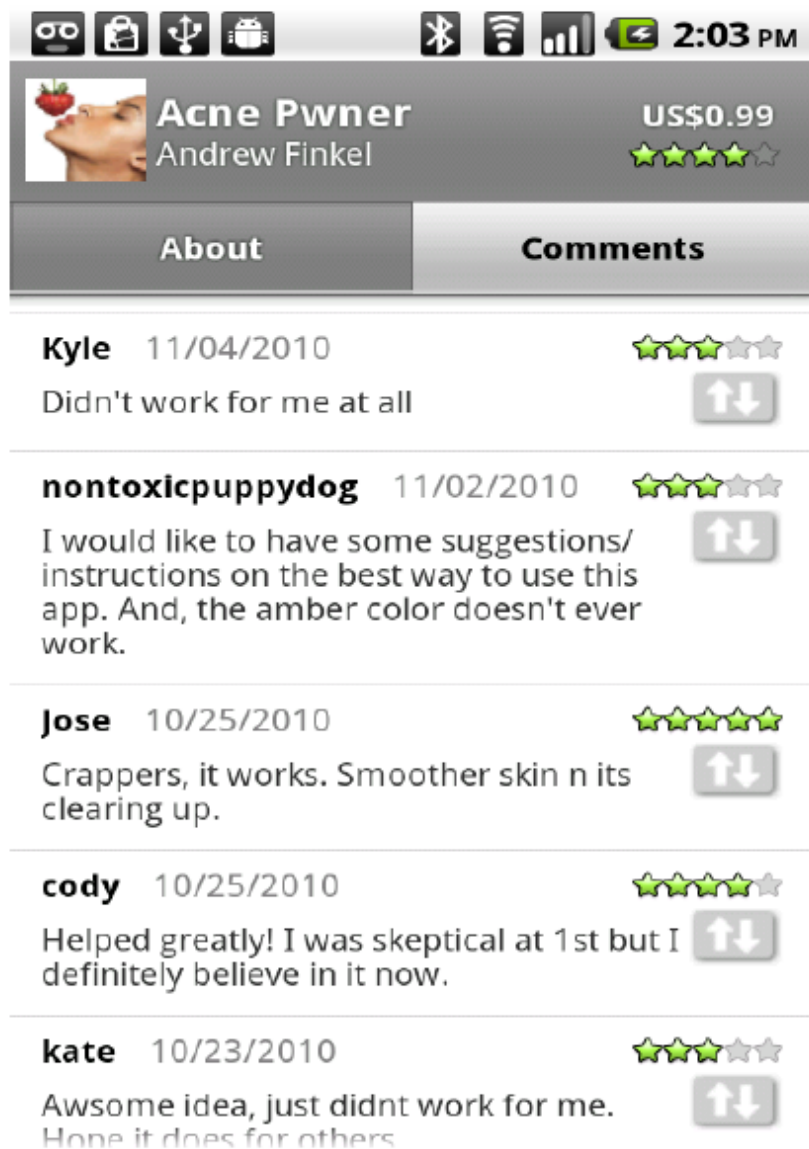
Raul 11/21/2010 ★★★★★
So you mean is safe to use? how long do you think would be the reccomended time usage?

Anonymous 11/21/2010 ★★★★★
@Raul It's not harmful, its the visual light spectrum. And its based on how frequency affects the body. People mostly use music for this kind of stuff

Puzzlespider 11/06/2010 ★★★★★
Works for me, but better instructions wouldn't hurt

Kyle 11/04/2010 ★★★★★
Didn't work for me at all

Complaint

EXHIBIT A

Decision and Order

DECISION AND ORDER

The Federal Trade Commission (“Commission”) having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft complaint that the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the respondent with violation of the Federal Trade Commission Act, 15 U.S.C § 45 *et seq.*; and

The respondent, his attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order (“consent agreement”), an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft complaint, a statement that the signing of said consent agreement is for settlement purposes only and does not constitute an admission by the respondent that the law has been violated as alleged in the complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission having thereafter considered the matter and having determined that it has reason to believe that the respondent has violated the Federal Trade Commission Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such consent agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Andrew N. Finkel (“Finkel”) is a software developer. His current principal office or place of business is located in Rochester, New York.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

Decision and Order

ORDER**DEFINITIONS**

For purposes of this order, the following definitions shall apply:

1. Unless otherwise specified, “respondent” shall mean Andrew N. Finkel.
2. “Commerce” shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.
3. The term “including” in this order shall mean “without limitation.”
4. The terms “and” and “or” in this order shall be construed conjunctively or disjunctively as necessary, to make the applicable phrase or sentence inclusive rather than exclusive.
5. The term “device” in this order shall be construed as a “device” within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

I.

IT IS ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other means, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any device, in or affecting commerce, shall not represent, in any manner, expressly or by implication, including through the use of a product name, endorsement, depiction, or illustration, that Acne Pwner or any other device provides effective treatment for acne, unless the representation is non-misleading and, at the time of making such representation, respondent possesses and relies upon competent and reliable scientific evidence that substantiates that the representation is true. For purposes of this Part I, competent and reliable scientific evidence shall consist of at least two

Decision and Order

adequate and well- controlled human clinical studies of the device, conducted by different researchers, independently of each other, that conform to acceptable designs and protocols and whose results, when considered in light of the entire body of relevant and reliable scientific evidence, are sufficient to substantiate that the representation is true.

II.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other means, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any device, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, including through the use of a product name, endorsement, depiction, or illustration, about the safety, benefits, performance, or efficacy of any device, unless the representation is non-misleading, and, at the time of making such representation, respondent possesses and relies upon competent and reliable scientific evidence that is sufficient in quality and quantity based on standards generally accepted in the relevant scientific fields, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that the representation is true. For purposes of this Part II, competent and reliable scientific evidence means tests, analyses, research, or studies that have been conducted and evaluated in an objective manner by qualified persons and are generally accepted in the profession to yield accurate and reliable results.

III.

IT IS FURTHER ORDERED that respondent shall pay to the Federal Trade Commission the sum of \$1,700. This payment shall be made in the following manner:

- A. The payment shall be made by wire transfer made payable to the Federal Trade Commission, the payment to be made no later than fifteen (15) days after the date that this order becomes final; provided that respondent is liable for the payment amount,

Decision and Order

including any default payment amount if the payment is in default, unless and until payment is made in full.

- B. In the event of any default in payment, which default continues for ten (10) days beyond the due date of payment, the amount due, together with interest, as computed pursuant to 28 U.S.C. § 1961(a), from the date of default to the date of payment, shall immediately become due and payable to the Commission. Respondent agrees that, in such event, the facts as alleged in the complaint shall be taken as true in any subsequent litigation filed by the Commission to enforce its rights pursuant to this order, including, but not limited to, a nondischargeability complaint in any subsequent bankruptcy proceeding.
- C. All funds paid pursuant to this Part, together with any accrued interest, shall be used by the Commission in its sole discretion to provide such relief as it determines to be reasonably related to respondent's practices alleged in the complaint, and to pay any attendant costs of administration. Such relief may include, but shall not be limited to, the rescission of contracts, payment of damages, and/or public notification respecting such unfair or deceptive acts or practices as alleged in the complaint. If the Commission determines, in its sole discretion, that such relief is wholly or partially impracticable, any funds not so used shall be paid to the United States Treasury. Respondent shall be notified as to how the funds are distributed, but shall have no right to contest the manner of distribution chosen by the Commission. No portion of the payment as herein provided shall be deemed a payment of any fine, penalty, or punitive assessment.
- D. Respondent shall make no claim to or demand for the return of the funds, directly or indirectly, through counsel or otherwise; and in the event of bankruptcy, respondent acknowledges that the funds are not part of

Decision and Order

the debtor's estate, nor does the estate have any claim or interest therein.

IV.

IT IS FURTHER ORDERED that respondent shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and, upon reasonable notice, make available to the Federal Trade Commission for inspection and copying:

- A. All advertisements and promotional materials containing the representation;
- B. All materials that were relied upon in disseminating the representation;
- C. All tests, reports, studies, surveys, demonstrations, or other evidence in his possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations; and
- D. All acknowledgments of receipt of this order obtained pursuant to Part V.

V.

IT IS FURTHER ORDERED that respondent shall deliver a copy of this order to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each person a signed and dated statement acknowledging receipt of this order. For current personnel, delivery shall be within five (5) days of the date of service of this order. For new personnel, delivery shall occur prior to their first assuming their responsibilities.

Decision and Order

VI.

IT IS FURTHER ORDERED that respondent shall notify the Commission at least thirty (30) days prior to creating, or assuming any ownership interest in, any corporation that may affect compliance obligations arising under this order. *Provided, further,* that respondent shall notify the Commission at least thirty (30) days prior to the dissolution, assignment, sale, merger, or other action involving such corporation that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the name or address of such corporation. *Provided, however,* that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, the respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. Unless otherwise directed by a representative of the Commission, all notices required by this Part shall be sent by overnight courier (not the U.S. Postal Service) to the Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580, with the subject line *In the Matter of Andrew N. Finkel*. *Provided, however,* that, in lieu of overnight courier, notices may be sent by first-class mail, but only if an electronic version of such notices is contemporaneously sent to the Commission at DEbrief@ftc.gov.

VII.

IT IS FURTHER ORDERED that respondent, for a period of five (5) years after the date of issuance of this order, shall notify the Commission of the discontinuance of his current business or employment, or of his affiliation with any new business or employment. The notice shall include the new business address and telephone number, his current residential address, and a description of the nature of his business or employment, and his duties and responsibilities. Unless otherwise directed by a representative of the Commission, all notices required by this Part shall be sent by overnight courier (not the U.S. Postal Service) to the Associate Director for Enforcement,

Decision and Order

Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580, with the subject line *In the Matter of Andrew N. Finkel*. *Provided, however*, that, in lieu of overnight courier, notices may be sent by first-class mail, but only if an electronic version of such notices is contemporaneously sent to the Commission at Debrief@ftc.gov.

VIII.

IT IS FURTHER ORDERED that respondent, within sixty (60) days after the date of service of this order, shall file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form in which he has complied with this order. Within ten (10) days of receipt of written notice from a representative of the Commission, he shall submit additional true and accurate written reports.

IX.

This order will terminate on October 13, 2031, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of this order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

- A. Any Part in this order that terminates in less than twenty (20) years; and
- B. This order, if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed

Analysis to Aid Public Comment

and the later of the deadline for appealing such dismissal or ruling, and the date such dismissal or ruling is upheld on appeal.

By the Commission.

**ANALYSIS OF CONSENT ORDER TO AID PUBLIC
COMMENT**

The Federal Trade Commission (“FTC” or “Commission”) has accepted, subject to final approval, an agreement containing a consent order from Andrew N. Finkel (“respondent”).

The proposed consent order (“proposed order”) has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement and take appropriate action or make final the agreement’s proposed order.

This matter involves the advertising of a mobile software application (“app”) called Acne Pwner which respondent developed and sold in Google’s Android Marketplace. Respondent claimed that Acne Pwner effectively treats acne. The instructions for this app directed consumers to hold the light-emitting display screen next to the area of skin to be treated for a few minutes each day.

The Commission’s complaint alleges that respondent violated Sections 5 and 12 of the FTC Act by claiming, without substantiation, that the app provided an effective treatment for acne.

The proposed consent order contains provisions designed to prevent respondent from engaging in similar practices in the

Analysis to Aid Public Comment

future. Part I of the order prohibits respondent from making any representation that Acne Pwner, or any other device as defined by Section 15 of the FTC Act, provides effective treatment for acne, unless respondent has competent and reliable scientific evidence to substantiate that claim.

Part II of the order requires respondent to have competent and reliable scientific evidence before making any safety, performance, benefits, or efficacy claim about any device.

Part III of the order requires respondent, within 15 days of the date the order becomes final, to pay the Commission \$1,700.

The remaining parts of the proposed order are standard provisions regarding record-keeping, dissemination of the order to officers and employees, prior notification to the Commission of corporate changes, notification of new employment, filing of compliance reports, and sunseting of the order.

The purpose of this analysis is to facilitate public comment on the proposed order, and it is not intended to constitute an official interpretation of the agreement and proposed order or to modify in any way their terms.

Complaint

**IN THE MATTER OF
CARDINAL HEALTH, INC.****CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF
THE CLAYTON ACT**

*Docket No. C-4339; File No. 091 0136
Filed, October 18, 2011 — Decision, October 18, 2011*

This consent order addresses the acquisition by Cardinal Health of nuclear pharmacies from Biotech Pharmacy, Inc., (“Biotech”) in the southwestern United States. anticompetitive effects. Nuclear pharmacies produce, distribute, and sell single photon emission computed tomography radiopharmaceuticals to hospitals and cardiology clinics, who use the products to diagnose and treat various diseases. The complaint alleges that Cardinal Health operates the nation’s largest network of nuclear pharmacies, and the acquisition would substantially lessen competition in the nuclear pharmacy markets in Las Vegas, Nevada; Albuquerque, New Mexico; and El Paso, Texas and enable Cardinal Health to increase prices for its nuclear pharmacy products. The order requires Cardinal Health to restore three nuclear pharmacies that it closed post-acquisition. The order further requires Cardinal Health to divest all intellectual property necessary for the acquirer to compete successfully in the nuclear pharmacy market. The order also requires Cardinal Health to grant each of its customers within the relevant geographic markets to terminate their existing contracts without penalty.

Participants

For the *Commission*: William H. Efron and Jonathan W. Platt.

For the *Respondent*: Geoffrey Oliver, Joe Sims, and David Wales, Jones Day.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Respondent Cardinal Health, Inc.’s (“Cardinal Health”) acquisition of certain assets of Biotech, violated Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. §